JOHN D. FERRERO

STARK COUNTY PROSECUTING ATTORNEY
Stark County Office Building, 110 Central Plaza South, Suite 510
P.O. Box 20049 Canton, Ohio 44701-0049
330-451-7897 • Fax 330-451-7965

July 15, 2005

Christina M. Wise, Property Tax Director
Stark County Auditor's Office
110 Central Plaza, South, Suite 220
Canton, Ohio 44702-1410

Re: Charging of Omitted Taxes
Our File No. M101.00256

Dear Ms. Wise:

I have before me your e-mail letter of June 13, 2005 in which you have requested our opinion concerning the inclusion on current tax lists of omitted back taxes. Your letter indicates that you desire further discussion of R.C. § 319.40, raised in a previous telephone conversation, as to whether "the County Auditor is <u>required</u> by law to charge omitted taxes once a discrepancy is identified and proven." You have also specifically asked questions regarding the following stated fact patterns.

1. A building permit received from municipality, township, village, etc. is properly entered in our system to create a work order on the parcel, but is missed or overlooked by our appraisal department or system. This causes the taxpayer to be charged taxes on land value only for the previous five years. The building is found during a routine appraisal visit or taxpayer phone call. Is it mandatory for the County Auditor to charge back taxes for the previous five years or since last date of change of ownership? Does it matter whether we properly received the building permit?

2. What if no building permit was taken out or filed and the house, building, etc. were found through taxpayer phone call or regular appraisal visit? Are we required to back tax the parcel/owner? What validation is needed for year built?

3. If the charging of omitted taxes is mandatory, what or any (sic) exceptions are there according to the Ohio Revised Code.

Our answers follow.

There are several statutes which bear on these issues as well as some legal principles established by the courts. Let us first review the provisions of R.C. § 319.40. It states:

> When the county auditor is satisfied that lots or lands on the tax list or duplicate have not been charged with either the county, township, municipal corporation, or school district tax, *he shall charge against it all such omitted tax for the preceding years, not exceeding five years,* unless in the meantime such lands or lots have changed ownership, in which case only the taxes chargeable since the last change of ownership shall be so charged. (Emphasis added.)

This provision addresses the situation wherein a specific valid tax has not been applied to a property. There are no errors as to buildings or square footage of lots, or other errors concerning the property. A valid tax is simply not applied to a property for which the records are otherwise accurate. When such errors occur, the auditor, when he is "satisfied that lots or lands on the tax list or duplicate have not been charged with either the county, township, municipal corporation, or school district tax" is required to charge the tax to the land in question. Note that the use of the word "shall" makes the auditor's obligation to charge the tax mandatory, not discretionary.

We next examine R.C. § 5713.19 dealing with the correction of errors. It states:

> A county auditor shall correct any clerical errors, as defined in section 319.35 of the Revised Code, that the auditor discovers concerning the name of the owner, valuation, description, or quantity of any tract or lot contained in the list of real property in the county.

This brings us to a discussion of clerical errors, for which we turn to R.C. § 319.35, which states:

> From time to time the county auditor shall correct all clerical errors the auditor discovers in the tax lists and duplicates in the name of the person charged with taxes or assessments, the description of lands or other property, the valuation or assessment of property or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessment, and shall correct the valuations or assessments on the tax lists and duplicates agreeably to amended, supplementary, or final assessment certificates. If the correction is made after a duplicate is delivered to the county treasurer, it shall be made on the margin of such list and duplicate without changing any name, description, or figure in the duplicate, as delivered, or in the original tax list, which shall always correspond exactly with each other.
>
> For the purposes of this section and section 319.36 of the Revised Code, a clerical error is an error that can be corrected by the county auditor from the inspection or examination of documents in the county auditor's office or from the inspection or examination of

> documents that have been presented to the county auditor and have been recorded by the county recorder. *Except as otherwise provided by law*, any error in the listing, valuation, assessment, or taxation of real property other than a clerical error constitutes a fundamental error and is subject to correction only by the county board of revision as provided by law. (Emphasis added.)

Revised Code § 319.36, not the subject of discussion here, addresses itself to the refund of taxes to property owners who have overpaid due to clerical errors as defined in § 319.35. This definition also applies to those clerical errors which the auditor is required to correct under R.C. § 5713.19.

Revised Code § 5713.21 also addresses itself to the correction of the auditor's records stating:

> The county auditor, if he ascertains that a mistake was made in the valuation of an improvement or betterment of real property or that its valuation was omitted, shall return the correct taxable value, after giving notice to the owner or agent thereof of his intention to do so.
>
> Additions made by the auditor pursuant to this section shall be listed upon the grand duplicate of the county and placed in the hands of the county treasurer for collection.

This section does not provide for the charging of taxes back for the previous five years. And, during a time when what is now R.C. § 5713.20 had been repealed, the Ohio Attorney General determined that no authority existed to charge back taxes for improvements or betterments which had been omitted; but that they could only be listed going forward. *See*, 1922 OAG No. 3013, attached. This view (but only if it were still the law) would apply to some of the fact situations you describe where a building might be omitted from a listing through inadvertence.

But what is now R.C. § 5713.20 was reenacted as General Code § 5573 (it had previously been G.C. § 5574, as referenced in the 1922 Attorney General opinion) and is the currently effective statute which most nearly corresponds to the issues you have raised. Subdivision (A) thereof states:

> (A) If the county auditor *discovers that any building, structure, or tract of land or any lot or part of either, has been omitted* from the list of real property, the auditor *shall* add it to the list, with the name of the owner, and ascertain the taxable value thereof and place it opposite such property. *The county auditor shall compute the sum of the simple taxes for the preceding years in which the property was omitted from the list of real property, not exceeding five years, unless in the meantime the property has changed ownership, in which case only the taxes chargeable since the last change of ownership shall*

> *be computed.* No penalty or interest shall be added to the amount of taxes so computed.
>
> The county auditor *shall* order the county treasurer to correct the duplicate of real property accordingly, and *shall* certify to the county treasurer the sum of taxes determined by the county auditor under this section to be due on the omitted property. *The county treasurer thereupon shall notify the owner by certified mail, return receipt requested, of the sum of taxes due, and inform the owner that the owner may enter into an omitted tax contract with the county treasurer to pay the taxes in installments, or that the owner, if the owner desires, may pay the amount of such taxes into the county treasury.* (Emphasis added.)

As you can see, the references to buildings, structures, or tracts of land outline the categories you have mentioned in your e-mail letter (building permits overlooked or omitted). This provision requires the auditor to correct his records, calculate the sum of simple taxes due, and certify them to the treasurer for collection. There is no discretion here. The auditor Is expressly required to "compute the sum of the simple taxes for the preceding years in which the property was omitted from the list of real property, not exceeding five years, unless in the meantime the property has changed ownership." The auditor may not choose to ignore these errors when they are brought to his attention. In our view, this is mandatory and constitutes an exception to R.C. § 5713.19 "as otherwise provided by law" whether it is either a clerical or fundamental error.

I have attached a copy of the Attorney General's opinion 1962 OAG 3169 for your perusal and commend it to you for its discussion of the distinctions between clerical and fundamental errors. The categorization of the errors to be corrected as clerical or fundamental is significant in that it affects the measures to be taken to correct them. With respect to clerical errors, the Court of Appeals for the First District of Ohio has stated:

> The grant of limited authority to correct clerical errors implies a lack of authority to make fundamental changes. Clerical errors are those which are computational in nature and do not involve the exercise of discretion or judgment. *Ins. Co. v. Cappellar* (1883), 38 Ohio St. 560; *Brooks v. Lander* (1905), 14 Ohio C.C. (N.S.) 481, affirmed sub nom. *Brooks v. Spencer* (1906), 74 Ohio St. 428, 78 N.E. 1119. Numerous decisions of the state Attorney General also support the view that, once the tax duplicate has been certified to the treasurer, the auditor has no revisory power but, rather, operates *functus officio*, so that any change in the assessment must be based upon an appeal to the board of revision. See, e.g., 1922 Ohio Atty.Gen.Ops. No. 3375. *State ex rel. Ney v. DeCourcy*, (Ohio App. 1 Dist. 1992) 81 Ohio App.3d 775.

While *DeCourcy* stands for the proposition that a change in an *assessment* cannot be made by the auditor after certification to the county treasurer, you should keep in mind that the "grant of limited authority" may contain a substantial universe of errors which may be corrected by the county auditor, so long as it does not involve the exercise of discretion and results in correction by means of mere recalculation. Neither the facts nor the law in this case addressed the provisions of R.C. §5713.20. It still stands, therefore, as the guiding rule for the auditor in the instances you describe.

By contrast, a fundamental error is one in which neither a tax nor any property has been omitted and the valuation believed in error is the exact valuation set and intended by the taxing authorities. Errors of this sort may only be corrected through processes established for the determination of valuation by the board of revision. Regarding the difference between clerical and fundamental errors, the Supreme Court of Ohio has stated:

> The difficulty, however, lies in the attempt to distinguish them. While we are not required in this case to lay down rules, if that were possible, by which in all cases the character of these errors, as being fundamental or merely clerical, may be determined, yet, certainly, those only are to be deemed fundamental that pertain to the very foundation upon which a tax rests. This of course includes defects and imperfections in the law itself, and errors of judgment committed by public boards acting within the scope of their authority. *State ex rel. Poe v. Raine* (Ohio 1890), 47 Ohio St. 447.

One of the foundations of the tax referred to by the court here is the auditor's assessment of valuation of property in the first instance. An error made in the exercise of discretion in determining the valuation of property is a fundamental error and may only be corrected by the procedures set forth in the statutes for correcting valuations about which there is disagreement, *i.e.,* appeal to the board of revision.

Concerning your immediate questions, however, the Attorney General has had occasion to discuss both R.C. §§ 319.40 and 5713.20 with respect to property which was incorrectly listed on the list of exempt properties in Morrow county. The cases cited therein, while not dispositive of the question raised, still "set forth the basic proposition that any general tax must be levied and collected with equality and that when a tax is lawfully levied, no public officer has a right to abate its imposition except as expressly provided by statute." *Id.* at p. 597. And further, "It appears from the provisions of Section 5719.20 and 319.40, *supra,* that property omitted from the tax list or listed on the tax list but omitted from taxation, must be immediately placed upon the duplicate when such an issue is discovered, and that the county auditor must at the same time charge against such property the taxes for the preceding five years." *Id.* We agree with that conclusion.

The examples you have raised, while not necessarily defined as clerical errors under R.C. §§ 319.35 and 5713.19, fall squarely into the category of discoveries, for lack of a better term, which are specifically addressed under R.C. § 5713.20 which, as discussed above, is an exception to the provisions of R.C. § 5713.19 requiring a fundamental error to be addressed through the board of revision. The absence of such a public policy as is expressed in R.C. § 5713.20 would encourage taxpayers to withhold information concerning buildings and improvements, avoiding both the building code and taxation for as long as such omissions or violations may go undiscovered. Revised Code § 5713.20 attempts to ensure that, for the current year and at least the previous five years, land and buildings will not escape lawful taxation.

In answer to your specific questions, it is our opinion, and you are so advised that, under R.C. § 5713.20, it is mandatory for the county auditor to charge back taxes for the previous five years or since the last date of change of ownership where property has been omitted due to the mishandling of building permits. It does not matter whether the building permit was properly received. No public officer has the right to abate such taxes due except according to statute.

If no building permit was issued and improvements are discovered in the ordinary course of business (or other means) the auditor is required to charge back taxes for omitted property to the parcel for any period the building is shown to have been there, not to exceed five years or from the date of last transfer. Validation of a period less than five years should be forthcoming from the property owner in the form of sworn testimony accompanied by such documentary evidence as may show a lesser period. The knowledge of witnesses (*e.g.,* neighbors, letter carriers, safety officials) may be sufficient to determine when improvements were made. In the absence of any such evidence to the contrary (and efforts should be made to obtain it) back taxes for a period of five years might lawfully be charged to the property.

The only exception known to us concerning the charging of omitted buildings or lands or taxes is the one expressed in both R.C. §§ 319.40 and 5713.20 concerning a date of transfer within less than five years. In such cases, the new owner cannot justly be made to pay uncharged taxes for a period when he did not own the property.

I trust this answers your questions. If I may be of further service, do not hesitate to write or call.

Very truly yours,

David M. Bridenstine

David M. Bridenstine
Assistant Prosecuting Attorney

DMB:dmb

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must, therefore, be considered general laws. 50 Ohio Jurisprudence, 2d, 19, Statutes, Section 9.

"The state department of health is clearly an arm of the state government created by the legislature to assist in the preservation and protection of the public health. 26 Ohio Jurisprudence, 2d, 665, Health, Section 5.

"The legislature has by virtue of Chapter 3709., Revised Code, provided for the creation of general and city health districts and such districts are agencies of the state created by the legislature to aid and promote the protection of public health on the local level. *State, ex rel. Mower v. Underwood,* 137 Ohio St., 1, *David Davies, v. Sensenbrenner,* 76 O.L.A., 33, 156 N.E., 2d, 202, 168 Ohio St., 356, (dismissed for want of debatable constitutional question).

"Thus it would appear that the 'state' should be excluded from the operation of Sections 4729.50 through 4729.66, Revised Code, unless specifically made subject to the law; and here it becomes necessary to consider whether the state is included within the definition set forth in Section 4729.50 (A), Revised Code, or by other specific provisions.

"Section 4729.50 (A), Revised Code, provides in part:

" 'As used in sections 4729.50 to 4729.66, inclusive, of the Revised Code:

" '(A) "Person" includes any corporation, association, or partnership of one or more individuals.

" '* * * * * * * * *' "

"A consideration of the definition of 'person' set forth in Section 4729.50 (A), Revised Code, clearly indicates that the legislature did not specifically include any agency, department or division of the state government."

A county is a mere agency of the state for certain specified purposes. 14 Ohio Jurisprudence 2d, 201, Section 4. Thus, the word "person" as here considered does not apply to the county and its officers and employees, including members of the board of county commissioners and directors and managers of county homes.

Accordingly, it is my opinion and you are advised that members of a board of county commissioners, and officers and employees of the county home, are not, in their operation of the county home, within the definition

of "person" as set forth in Section 4729.50 Revised Code, and are not subject to the provisions of Sections 4729.50 to 4729.66, inclusive, and 4729.99, Revised Code.

Respectfully,
MARK MCELROY
Attorney General

3169

WHEN IT IS DISCOVERED THAT REAL PROPERTY HAS ERRONEOUSLY BEEN EXEMPTED FROM THE TAX LIST FOR MORE THAN FIVE YEARS WHILE OWNED BY ONE PERSON, THE COUNTY AUDITOR MUST ADD SAID PROPERTY TO THE LIST OF TAXABLE PROPERTY AND CHARGE IN ADDITION TO THE CURRENT TAXES, THE TAXES FOR THE PREVIOUS 5 YEARS—§§5713.20, R.C., 319.40, R.C.

SYLLABUS:

When it is discovered that real property has erroneously been carried on the tax list as exempt from taxation for more than five years, during which time said property was owned by the same person, the county auditor must add said property to the list of taxable property in accordance with the provisions of Section 5713.20, Revised Code, and charge, in addition to the taxes for the current tax year, the taxes for the five preceding years in which said property had escaped taxation.

Columbus, Ohio, July 27, 1962

Hon. Thomas E. Ray, Prosecuting Attorney
Morrow County, Mt. Gilead, Ohio

Dear Sir:

I have your request for my opinion which reads as follows:

" 'Whether real estate property owned by a Union Cemetery, which has for thirty (30) years been improperly carried on the county tax duplicate as "exempted from taxation", is now liable for back tax for the full period of its ownership?'

"The problem arose out of the following fact situation: The Rivercliff Union Cemetery received a bequest of a block of

> business buildings in Mount Gilead, Ohio, in 1932, which it has been renting to the general public. Since that time the building has been carried as 'exemption from taxation' by the County Treasurer. The exemption was not based a certificate issue by the Board of Tax Appeal, nor is there even a record of application for exemption on file with the County Auditor or State Board of Tax Appeals.
>
> "In May 1962, this office issued its opinion, that the property could not be exempted because the buildings did not meet the prerequisites required under the general statutory exemption of public property, because the property was leased to the general public for commercial use, we then ordered the property placed on the tax duplicate."

As is inferred from the statement in your request, an exemption from real property tax may not be granted without the authorization of the Board of Tax Appeals. This requirement is presently found in Section 5713.08, Revised Code, and a similar requirement was, in 1932, found in Section 5770-1, General Code, which was enacted in 1923 by the 85th General Assembly, 110 Ohio Laws 77. Based on the facts stated in your request, it appears that the property in question could not have been exempt from real estate taxes from 1932 to date.

In connection with the general authority of the taxing body to compromise, release, or abate taxes, the Supreme Court of Ohio said in the case of *The State ex rel. Donsante, a Taxpayer, Appellant,* v. *Pethel, Auditor, et al., Appellee,* 158 Ohio St., 35, at page 39:

> "* * * * * * * * *
>
> "The general rule is that the power to tax does not include the power to remit or compromise taxes. A tax is not predicated on contract and cannot be discharged by reason of contractual considerations. Where taxes are legally assessed, the taxing authority is without power to compromise, release or abate them except as specifically authorized by statute, and is for the reason that, if such contracts can be made and performed on the part of a municipality, uniformity and equality are destroyed, and the burden of obligation so remitted is inequitably cast upon the payers of general taxes in the taxing district."

The first paragraph of the syllabus of the *Pethel,* case, *supra,* reads as follows:

> "1. Where taxes are legally assessed, the taxing authority is without power to compromise, release or abate them except as specifically authorized by statute."

While the *Pethel,* case, *supra,* is not dispositive of the question raised in your request, the above quoted matter is of importance herein in that it clearly sets forth the basic proposition that any general tax must be levied and collected with equality and that when a tax is lawfully levied, no public officer has a right to abate its imposition except as expressly provided by statute.

With regard to the statutory obligation of the county auditor in connection with property omitted from the tax list, your attention is called to Section 5713.20, Revised Code, which reads as follows:

> "If the county auditor discovers that any building, structure, or tract of land or any lot or part of either, has been omitted from the list of real property, he shall add it to the list, with the name of the owner, and ascertain the value thereof and place it opposite such property. In such case he shall add to the taxes of the current year the simple taxes of every preceding year in which such property has escaped taxation, not exceeding five years, unless in the meantime the property has changed ownership, in which case only the taxes chargeable since the last change of ownership shall be added; or the owner thereof, if he desires, may pay the amount of such taxes into the county treasury, on the order of the auditor."

Also in this regard, your attention is directed to Section 319.40, Revised Code, which reads as follows:

> "When the county auditor is satisfied that lots or land on the tax list or duplicate have not been charged with either the county, township, municipal corporation, or school district tax, he shall charge against it all such omitted tax for the preceding years, not exceeding five years, unless in the meantime such lands or lots have changed ownership, in which case only taxes chargeable since the last change of ownership shall be so charged."

It appears from the provisions of Section 5719.20 and 319.40, *supra,* that property omitted from the tax list or listed on the tax list but omitted from taxation, must be immediately placed upon the duplicate when such an issue is discovered, and that the county auditor must at the same time charge against such property the taxes for the preceding five years.

In the case of *Heuck, County Auditor, et al.,* v. *The Cincinnati Model Homes Co.,* 130 Ohio St., 378, the Supreme Court considered the provisions of the above quoted statutes in an earlier form as well as other provisions of the taxing laws in connection with the authority of the county auditor to correct an error in connection with the computation of the tax, which correction resulted in the assessment of taxes over and above the amount charged for five preceding years. The court said in the *Heuck* case, *supra*, beginning at page 381:

"* * * * * * * * *

"These laws do not relate to the imposition and creation of tax obligations but wholly to the mechanics of tax valuation and enforcement. They are therefore remedial in their nature and require a liberal construction to the end that taxable real estate shall not escape just taxation. *State, ex rel. Poe, v. Raine*, 47 Ohio St., 447, 454, 25 N.E., 54; *Gager, Treas., v. Prout*, 48 Ohio St., 89, 108, 26 N.E., 1013.

"Counsel for the defendant in error contend that there was no omission of the building or any part of it within the meaning of Section 5573, General Code, during the five years involved, but merely an undervaluation or mistake in valuation within the meaning of Section 5573, General Code, and that the auditor has no authority to assess a 'back tax' for an under-valuation or a mistake in valuation. Their argument is that the entire building was in fact listed on the tax duplicate and valued and assessed thereon, and that the mistake made in 1925 was in the valuation itself and had nothing to do with the inclusion of the building on the tax list or its subjection to the tax.

"If this meaning can be derived from these two sections at all, it is by a strict and narrow construction of them taken apart from all other related sections. These various sections cover both tax additions and refunders. It would be but logical to expect the legislature to treat the correction of an undercharge and overcharge in a similar manner. Obviously to take a few sentences literally and apart may mislead as to the spirit and intent of the law. While, by a broad construction of Section 5573, General Code, taken alone, it would seem that the omission of part of a building may be cured by adding the omitted part; yet all the sections referred to are *in pari materia* and must be construed together. When this course is pursued it is evident that a curable omission in valuation of a building is one which results from an error which is clerical and not fundamental; if fundamental there is no omitted property which may be supplied. In the latter case the valuation is in the exact amount that the taxing authorities intended. A change of valuation wrong fundamentally, would result, not in a corrected valuation, but in a new one. *State, ex rel. Sisters of Notre Dame v. Commissioners of Montgomery County*, 31 Ohio St., 271; *State, ex rel. Poe v. Raine, supra*; *State, ex rel. Pulskamp, v. Commissioners of Mercer County*, 119 Ohio St., 504, 164 N.E., 755; 38 Ohio Jurisprudence, 1035, Section 253. Where a clerical error in computation results in a wrong or mistaken valuation which is not in accord with the universal class formula adopted for its determination, there is an omission of part of a building from the tax list and duplicate and the omitted part may be added. Any other construction would not be in accord with the policy of our law that no taxable real property should escape just taxation."

Considering the above quoted language of the court, it appears that in order to determine whether the provisions of Section 5713.20 and/or 319.40, Revised Code, are applicable in the instant case, it must first be determined whether the error which caused said property to be carried as exempt for thirty years was in the nature of a clerical error or a fundamental error as described by the court in the passage quoted above. The court said that a fundamental error is one where the amount of the tax imposed is what the taxing authorities intended. It is clear from a reading of said passage that this infers that the taxing authority had a right under law to assess said intended amount even though said assessment may have been contrary to practice. In the instant case, as is pointed out above, the taxing authorities had no right under the law to provide for an exemption of the property in question. I am, therefore, of the opinion that the error involved herein is not a fundamental error as described by the court in the *Heuck* case, *supra*, but is in fact a clerical omission and that such omission must be rectified in accordance with the applicable provisions of the Revised Code.

Considering Sections 5713.20 and 319.40, *supra*, in connection with the above conclusion it is obvious that the Rivercliff Union Cemetery must be required to pay the current taxes as well as the taxes for five preceding years. The question as to which of these two statutes controls is therefore moot. However, since the error in question was apparently an error whereby the property in question was omitted from the general tax list as required by Section 319.28, Revised Code, as opposed to an error wherein the property was placed on such tax list but was not duly taxed, it would appear that the provisions of Section 5713.20 should govern in the instant case. I am assuming in this statement that the auditor kept two separate lists, one the general taxing list as required by Section 5713.01, Revised Code, and the other a tax exempt list as provided for in Sections 5713.07 and 5713.08, Revised Code.

Finally, your attention is directed to the case of *The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company*, v. *The County Treas-*

urer, Clark County, 78 Ohio St., 227, wherein the court considered a question involving the provisions of Section 2803, Revised Statutes, which contained language analogous to that now found in Section 5713.20, *supra.* The first paragraph of the syllabus of the *Clark County* case, *supra,* reads as follows:

> "In the interpretation of Section 2803, Revised Statutes, the expression 'current year' should be construed to mean the current tax year, and not the current calendar year."

It will be noted that Section 5713.20, *supra,* still contains the phrase "current year," and in accordance with the above quoted syllabus said language should be construed to mean the current tax year. Accordingly, the five years of taxes which the county auditor may assess under the provisions of said section would be those five years which immediately precede the current tax year.

In accordance with the foregoing, I am of the opinion and you are advised that when it is discovered that real property has erroneously been carried on the tax list as exempt from taxation for more than five years, during which time said property was owned by the same person, the county auditor must add said property to the list of taxable property in accordance with the provisions of Section 5713.20, Revised Code, and charge, in addition to the taxes for the current tax year, the taxes for the five preceding years in which said property had escaped taxation.

Respectfully,
MARK MCELROY
Attorney General

3170

TOWNSHIP CEMETERY PROPERTY WITHIN A CITY ACCRUES TO THE CITY BUT PERSONAL PROPERTY OF THE OLD TOWNSHIP GOES TO THE NEW TOWNSHIP, WHEN A NEW TOWNSHIP IS FORMED OUT OF THE OLD—LEVY PROCEEDS DIVIDED BETWEEN CITY AND OLD TOWNSHIP—CITY AND TOWNSHIP MAY UNITE IN THE MANAGEMENT OF THE CEMETERY.

SYLLABUS:

1. When under Section 503.07, Revised Code, a new township is established out of the portion of a township comprising a city, the city, under Section 759.08, Revised Code, takes title to cemetery property owned by the original township but lying entirely within the borders of the city; and under Section 759.09, Revised Code, the cemetery is operated by the director of public service of the city. Personal property of the original township which property was not divided under Section 707.28, Revised Code, at the time the municipal corporation was incorporated, and remained the property of the township, remains the property of said original township when the new township is established.

2. In such a situation, where a special levy for the purpose of the township cemetery exists in the original township, the proceeds of such levy should be apportioned bewteen the two townships under Section 503.03, Revised Code, the amount due the new township being allocated to the city under Section 703.22, Revised Code.

3. The city and the original township may, pursuant to Section 759.27 *et seq.*, Revised Code, unite in the management of the cemetery. (Opinion No. 817, Opinions of the Attorney General for 1951, page 606, approved and followed.)

Columbus, Ohio, July 27, 1962

Hon. Everett Fahrenholz, Prosecuting Attorney
Preble County, Eaton, Ohio

Dear Sir:

Your request for my opinion reads as follows:

> "The City of Eaton has filed a petition to detach from Washington Township, as provided in Ohio Revised Code Section 503.07. It is mandatory that the Commissioners grant the petition, and this action will likely occur about May 1, 1962.
>
> "I will appreciate your early opinion upon the following resulting questions:

3013.

TAXES AND TAXATION—WHERE COUNTY AUDITOR DISCOVERS REAL ESTATE OMITTED FROM TAX DUPLICATE OF PREVIOUS YEARS—MANDATORY DUTY TO ADD TO TAXES OF CURRENT YEAR FOR PRECEDING YEARS NOT EXCEEDING FIVE—AN EXCEPTION—AUTHORITY OF COUNTY AUDITOR WHEN IMPROVEMENT ON REAL ESTATE OMITTED FROM DUPLICATE—MAY CORRECT VALUE—WITHOUT POWER TO ASSESS BACK TAXES ON SUCH BEHALF.

If the county auditor discovers that any tract of land or lot has been omitted from the tax duplicates of previous years it is his mandatory duty to add to the taxes of the current year the simple taxes of each preceding year in which the property has escaped taxation, not exceeding five years unless in the meantime the property has changed ownership, in which case only the taxes chargeable since the last change of ownership are to be added.

If the auditor discovers that improvements on real estate are omitted from the duplicate, it is his duty to return the corrected value thereof; but he is without power to assess back taxes on such behalf.

COLUMBUS, OHIO, April 21, 1922.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The Commission requests the opinion of this department upon certain inquiries submitted by the auditor of Cuyahoga county, as follows:

"1st. Is 5573 mandatory so that the auditor is compelled to impose the tax for a period of five years where the present taxpayer was the owner of the property for a period longer than that time?

2nd. If the lot upon which the building is situated has, at all times, been taxed, but the building has not, has the auditor power to add this omitted building for said period of time?"

Section 5573 of the General Code provides as follows:

"If the county auditor discovers that any tract of land or any lot or part of either, has been omitted, he shall add it to the list of real property, with the name of the owner, and ascertain the value thereof and place it opposite such property.

In such case he shall add to the taxes of the current year the simple taxes of each and every preceding year in which the property has escaped taxation, not exceeding, however, five years, unless in the meantime the property has changed ownership, in which case only the taxes chargeable since the last change of ownership shall be added; or the owner thereof, if he desires, may pay the amount of such taxes into the county treasury, on the order of the auditor."

The form of this section is mandatory, and no reason is observed why the positive words in it should be given any limited application or interpreted as reposing in the auditor any discretion in the matter. The first question submitted by the county auditor is therefore answered in the affirmative.

As to the second question above stated, it might seem to involve the inquiry as to whether the phrase "any tract of land or any lot or part of either" embraces the improvements on a tract or lot required by other sections of the General Code to be separately valued for taxation purposes (see section 5554 of the General Code).

But the setting in which this section is found, and particularly its history, furnishes an answer to this question and forecloses any further inquiry into it. Section 5576 immediately succeeding, provides as follows:

"Such county auditor, if he ascertains that a mistake was made in the value of an improvement or betterment of real property, or that the true value thereof was omitted, shall return the correct value, having first given notice to the owner or agent thereof, of his intention so to do."

This section does not authorize placing the omitted or corrected value of the improvement or betterment on the duplicate for any preceding years; but it does provide a separate method of placing omitted or corrected valuations of such improvements or betterments on the duplicate for the current and subsequent years. This of itself might furnish a sufficient answer to the second question submitted by the auditor.

But when we take into account that section 5574 of the General Code, now repealed, provided expressly for placing omitted buildings, etc., on the duplicate for preceding years, this conclusion becomes inescapable. Said section 5574 formerly covered both subjects in the following language:

"When a county auditor discovers or has his attention called to the fact, that an assessor in any previous year had omitted to return, or, in any years omits to return lands, town lots, or improvements, structures or fixtures thereon, subject to taxation, situated within the county; or if such property has escaped taxation by reason of an error of the auditor, he shall ascertain the value thereof for taxation, as near as may be, and enter said lands, town lots, or improvements upon the duplicate of the county, then in the hands of the county treasurer, and add to the taxes of the current year the simple taxes of each and every preceding year in which the property has escaped taxation, as far back as the next preceding appraisement and equalization of real estate in his county, unless in the meantime the property has changed ownership, in which case only the taxes chargeable since the last change of ownership shall be added; or the owner thereof, if he desires, may pay the amount of such taxes into the county treasury, on the order of the auditor."

The repeal of this section came about in the enactment of the act found in 107 O. L. 29 revising the assessment laws of the state after the so-called Parrett-Whittemore law had been held to be unconstitutional. This act, passed as an emergency measure, abolished the functions of the personal property assessors with respect to the taxing of improvements on real estate, and made the county auditor the assessor of all real estate, including buildings. Consistently with this policy, original sections 5573 and 5576, relating to the duties respectively of the real property assessor and the personal property assessor, were done away with, and the two sections which have been quoted in this opinion as being now in force were substituted for them. Old section 5574, being in part covered by new section 5573, was repealed, as was section 5575 relating to the duties of the personal property assessor in valuing new buildings. All these sections in their previous form had been a part of the scheme of quadrennial appraisement, and their revision was imperatively called for by the adoption of the new policy. Nevertheless, the omission from the new sections of the language of the old, dealing specifically with the assessment of back taxes on account of omitted improvements, taken in connection with the form in which the sections appear as revised, establishes beyond doubt the conclusion that there is now no authority to do this.

Accordingly, the second question submitted by the auditor is answered in the negative.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3014.

BOARD OF EDUCATION—NO AUTHORITY TO EXPEND FUNDS FOR RENT OF HOUSE TO BE USED AS TEACHERS' HOME—WHEN BOARD MAY PURCHASE REAL ESTATE FOR PURPOSE OF ERECTING SUCH HOME—COST OF BUILDING CONTRIBUTED BY PRIVATE DONATIONS.

A board of education is without authority to expend its funds or advance money for the rent and the furnishing of a house to be used as a teachers' home; but a board of education may, under the provisions of section 7624 G. C., purchase real estate as a site for the purpose of erecting such a home for school teachers employed in the district, when the cost of the erecting of the building has been contributed by private donations.

COLUMBUS, OHIO, April 21, 1922.

HON. EDWARD C. STANTON, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of a letter from your office signed by Hon. E. J. Thobaben, assistant prosecuting attorney, requesting the opinion of this department upon the following statement of facts:

> "The board of education of Dover township rural school district desires to know whether they would have the right to expend or rather advance money for the rent of and for furnishing a house to be used as a teachers' home. They are having great trouble in keeping teachers because of insufficient housing facilities. It is their intention merely to advance this money and get it back by having the teachers pay the equivalent of the rent plus a proportion of the cost of the furnishing so that this will eventually be paid for."

In reply to your inquiry you are advised that all that appears in the statutes upon the question of "teacherages" or buildings to be used as homes or houses for public school teachers, occurs in section 7624 G. C., which reads as follows:

> "When it is necessary to procure or enlarge a school site, or to purchase real estate to be used for agricultural purposes, athletic field or playground for children, or for the purpose of erecting and maintaining buildings to be used as homes or houses for public school teachers, when the cost of such erection has been contributed by private donations or for the purpose of providing an outlet to dispose of sewage from a school building or grounds, and the board of education and the owner of the property needed for such purposes, are unable to agree upon the sale and purchase thereof, the board shall make an accurate plat and description of the parcel of land which it desires for such purposes, and file them with the probate judge, or court of insolvency of the proper county. Thereupon the same proceedings of appropriations shall be had which are provided for the appropriation of private property by municipal corporations."

In your inquiry you indicate it is the desire of the board of education in question "to advance this money and get it back by having the teachers pay the equivalent of the rent plus a proportion of the cost of the furnishing, so that this will eventually be paid for." That is to say, the board of education desires to rent and furnish a house not for the purpose of school rooms, but to be used as a teachers' home in the district where the teachers are employed. If the board of education is to advance this money, as you indicate, and get it back by having the teachers pay rent to the board of education, apparently the board of education would be investing its funds for a purpose other than that which is authorized by law. Investigation shows that the question of "erecting and maintaining buildings to be used as homes or houses for public school teachers" was the real subject in House Bill 761, as passed by the 83d General Assembly on February 4, 1920, and filed in the office of the Secretary of State on February 19, 1920. This bill amended section 7624 in the manner in which it is quoted above, but it will be noted that the authority of the board of education under section 7624, as it now reads, is only that a board of education may appropriate private property by process of law

> "when it is necessary * * * to purchase real estate * * * for the purpose of erecting and maintaining buildings to be used as homes or houses for public school teachers, *when the cost of such erection has been contributed by private donations* * * *."

The effect of this is that in a community where the building has been furnished or the cost of erecting such building has been furnished by private donations, the board of education, desiring to use such building as a teachers' home for that district, may purchase real estate to be used as a site for such building, the cost of which has been contributed by private donations. A board of education is not permitted to invest its funds unless authorized to do so by specific grant appearing in the law. Thus it was held in Opinion 1111, issued on April 2, 1918, appearing at page 497, Vol. I, Opinions of the Attorney-General for 1918, that:

> "A board of education is not authorized to invest funds at its disposal."

While the necessity for a teachers' home of this kind in a certain district might be great and it is commendable for a board of education to consider proper housing facilities for its employed personnel, the General Assembly, so far has not given any authority to a board of education to go beyond the limits appearing in section 7624 G. C., and if proper authority for action of this kind were desired, it is the subject for future legislative enactment.

Bearing upon the authority of boards of education, your attention is invited to the very recent decision of the Supreme Court in the case of State of Ohio ex rel. Clark vs. Cook, decided November 22, 1921, the second branch of the syllabus reading as follows:

> "2. Boards of education, and other similar governmental bodies, are limited in the exercise of their powers to such as are clearly and distinctly granted. (State ex rel. Locher, Prosecuting Attorney, vs. Menning, 95 Ohio State, 97, approved and followed.)"